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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.922 OF 2004

Balwant Vitthal Shedge — Appellant
versus
Smt.Samabai Dadu Kamble — Respondent

Mr.S.D.Thokade for appellant.

Mr.Neville D. Deboo i/by Mr.Sunil Kadam for respondents 1 and 2.

CORAM : DR.D.Y.CHANDRACHUD, J.

DATE : 06TH JULY 2007

PC :

1. The appellant who is the original plaintiff purchased one third share out of the Southern portion of land bearing Survey No.39/4, G.P.No.135 within the limits of Village Shendgewadi. The remaining 2/3rd of the Northern portion is alleged to be in the ownership of the respondent-original defendant. According to the appellant the respondent started interfering with the possession of the appellant upon which the appellant instituted Regular Civil Suit No.14 of 1996 for injunction. The respondent filed a written statement and resisted the claim. A

Court Commissioner was appointed and the map at Exhibit-29 was submitted together with the report of the Commissioner. The Trial Court dismissed the suit instituted by the appellant and the dismissal was confirmed by the Appellate Court.

2. At the hearing of the Second Appeal the submission which has been urged on behalf of the appellant is that both the Courts below have completely overlooked the cross-examination of the respondent. Hence, it is urged that an order of remand would be warranted to the Appellate Court for reconsideration of the entire material on record. The Second Appeal is admitted and is, by consent, taken up for hearing at this stage.

3. The following substantial question of law arises :-

(i) Whether the order of the Appellate Court is sustainable in view of the omission on the part of the Appellate Court to consider the material aspects of the evidence, more particularly the admissions contained in the cross-examination of the respondent?

4. The learned counsel appearing on behalf of the appellant has placed on record a copy of the deposition of the respondent and is relying upon the admissions therein in the course of cross-examination. In the course of the evidence an admission was made on behalf of the defendant-respondent that their property is situated on the Northern side of the property of the appellant. In the circumstances, at least prima facie, there would be merit in the contention urged on behalf of the appellant that the respondent would have no concern with the Southern portion of the suit property. More over, it has been urged that there was a clear admission on the part of the respondent that prior to the year 1995 the respondent did not reside in the suit property. There is a further admission to the effect that there are three co-owners of the entire property bearing Survey No.34/9 and that the appellant-plaintiff has purchased 1/3rd share of the property. The witness admitted that as between the property of the appellant and the respondent, there is a portion of land which is owned by one Samabai and that the house property of the plaintiff is to the Southern portion of Samabai’s property. The report of the Court Commissioner was also on the

record before the Trial Court.

5. In my view, without expressing any final or conclusive view on the merits of the rival contentions, it would be proper to remand back the matter to the Appellate Court for fresh consideration. The Appellate Court ought to have taken into account the entire documentary and oral evidence on record and ex-facie there is a manifest failure of justice on account of the omission to appreciate the evidence arising out of the cross-examination of the respondent's witness. The learned counsel appearing on behalf of the respondent is not in a position to dispute this position.

6. In the circumstances, the Second Appeal stands allowed. Consequently, the judgment of the Additional District Judge, Islampur dated 19th April 2004 in Regular Civil Appeal No.886 of 1999 shall stand quashed and set aside and the Civil appeal shall stand restored to the file of the Appellate Court. The Appellate Court is requested to dispose of the appeal after hearing the parties. In the mean time, until the civil appeal is disposed of, the ad-interim order dated 19th July 2004 passed in this proceeding, shall

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continue to operate. The Appellate Court is requested to dispose of the civil appeal within a period of six months from the date of production of a certified copy of this order.

7. In view of disposal of the Second Appeal, Civil Application Nos.1083 of 2004 and 693 of 2006 do not survive and stand disposed of as such.

(DR.D.Y.CHANDRACHUD, J.)